UNITED STATES
v.
MAURICE DUVAL ET AL.

IBLA 80-68 Decided March 26, 1981

Appeal from the decision of Administrative Law Judge E. Kendall Clarke dismissing contest Nos. OR 17779 through OR 17786.

Affirmed as modified.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

The sufficiency of a Government's prima facie case is dependent upon the direct evidence presented by the Government together with the testimony of Government witnesses elicited in cross-examination.

2. Mining Claims: Discovery: Marketability

Where demand is limited to a very few consumers who supply their needs from their own sources so that the market is "closed" or "captive," a mining claimant must show a reasonable likelihood that the consumers will buy the material from the claim at a profit to the mining claimant. Where such a showing is made, a contest complaint is properly dismissed.

APPEARANCES: Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellant; T. Leonard O'Byrne, Esq., and P. David Ingalls, Esq., O'Byrne & Ingalls, Portland, Oregon, for appellees.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Department of Agriculture has appealed the decision of Administrative Law Judge E. Kendall Clarke, dated October 19, 1979, dismissing contest complaints filed in OR 17779 through OR 17786.

On December 30, 1959, Maurice Duval 1/ located 10 placer mining claims known as the Fox Nos. 1-10 covering an area of silica sand dunes in the Siuslaw National Forest. 2/ These lands were later included in an application of withdrawal of dune lands dated January 18, 1962, for scenic recreation purposes submitted by the U.S. Forest Service, Department of Agriculture, to the Department of the Interior. The lands became part of the Oregon Dunes National Recreation Area by enactment of P.L. 92-260 on March 23, 1972, 16 U.S.C. § 460z (1976).

On November 4, 1977, the Bureau of Land Management (BLM), on behalf of appellant, issued a contest complaint against each claim charging that

> [t]he presence of a valuable mineral deposit has not been demonstrated prior to July 18, 1961, the date the application for withdrawal of lands for the Oregon Dunes National Recreation Area was noted to the records in the Bureau of Land Management, segregating the subject area from mineral location and entry under the mining laws.

Appellees timely denied the charge.

A hearing was held before Administrative Law Judge Clarke on September 19, 1978. At the outset, the parties entered into the following stipulations: (1) the presence of a valuable mineral need be established as of January 19, 1962, rather than July 18, 1961, as stated in the complaint; (2) the sand involved in this proceeding is identical in quality to the sand from claims contested in United States v. Maurice Duval, 1 IBLA 103 (1970), aff'd, Duval v. Morton, 347 F. Supp. 501 (D. Or. 1972), aff'd, Civ. No. 72-2839 (9th Cir. Dec. 19, 1973), which was determined to be uncommon variety sand; (3) the volume of sand on the claims is 10 million tons; and (4) the direct testimony of Government witness, Milvoy Suchy, and all testimony of appellees, together with that of George Carter and Henry Harris from the hearing held prior to the decision in United States v. Duval, supra, would be admitted as if these individuals had given the testimony under oath at this hearing, although both Suchy and appellee would testify again.

1/ Maurice Duval represents all of the colocators of these claims in this appeal. The other colocators were Marianne Duval, Henry Johnson, Hazel Johnson, John Duval, Anna Duval, Harold Duval, and Betty Duval. Henry Johnson and John Duval are deceased and their interests are claimed by their surviving spouses.

2/ The claims are located in secs. 18, 19, 30, and 31, T. 21 S., R. 12 W., Willamette meridian, Douglas County, Oregon.

A valuable mineral is present, and discovery exists, where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined to require a showing of marketability; that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra. The primary issue addressed at the contest hearing was whether the sand on appellees' claims was marketable prior to January 19, 1962, and continued to be marketable to the present.

Judge Clarke concluded that by a preponderance of the evidence there was a demand for the sand in appellees' claims in 1962, it could have been sold at a profit, and the sand has continued to be marketable. He therefore dismissed the contests.

In its statement of reasons appellant argues that, contrary to Judge Clarke's finding, there were no willing buyers of appellees' sand in 1962. Appellant submits that the foundry market already had a cheap available source of sand and that although the supervisor of purchasing and transportation for Owens-Illinois, a glass manufacturer, stated that Owens-Illinois would have purchased the sand from appellees' claims knowing what it knew following tests of the sand in the late 1960's to early 1970's, it was not prepared to actually buy the sand in 1962.

Appellant also argues that Judge Clarke erred in not addressing the Board findings of fact and law as set out in United States v. Duval, supra, since that case involved the same mineral from placer claims located by appellees in the same general area of Oregon and marketability at approximately the same time, and the Board affirmed a hearing examiner's decision declaring the claims null and void for failure to show that the mineral was marketable at a profit prior to the withdrawal of the lands for the dunes recreation area.

We have reviewed the record in the case and have concluded that Judge Clarke's findings of fact are substantially accurate. Judge Clarke's summary of the evidence and factual analysis is set out in his decision at pages 3 to 12 and 15 to 17.

[1] While we agree with the basic factual determination made by Judge Clarke, we do wish to note our disagreement with two specific statements. First, Judge Clarke stated that the Government established a prima facie case "by the barest minimum of necessary evidence" (Decision at 15). Our review of the record does not support this assessment.

In the first place, the evidence presented in the Government's prima facie case was basically the same as that presented in United States v. Duval, supra, which this Board found sufficient to invalidate 24 claims. The Board's decision was affirmed by both the district and circuit courts. Whatever countervailing evidence appellees may have

produced before Judge Clarke does not undermine the Government's prima facie case. The existence of a prima facie case is determined upon the evidence which the Government submits and is not dependent upon any contrary showing of a contestee in presenting his own case.

It is, of course, axiomatic that testimony of any Government witness obtained in cross-examination is properly weighed in establishing whether a prima facie case has been presented. It seems clear to us that Judge Clarke largely discounted Milvoy Suchy's testimony because of answers given during cross-examination. Thus, Judge Clarke stated:

> By Mr. Suchy's admission on cross-examination, he now admits he was aware of freight service from the Coos Bay region to Portland in 1961. This is in contrast to his testimony given at the prior hearing, where he vehemently denied that such rates were obtainable. This he professed although at that time he had no evidence to support his contention. In addition, any part of Mr. Suchy's testimony based upon "common knowledge" or events that are "self-evident" alleging the lack of marketability are little more than surmise and conjecture. Consequently, they must be afforded little weight.

(Decision at 15).

Counsel for the Government takes strong exception to his finding which clearly implies that Suchy was less than forthcoming at the original hearing. Our review of the record leads us to conclude that Judge Clarke may well have misinterpreted the testimony of both Suchy and Duval as it related to this question. In order to clear up this matter it will be necessary to make a detailed examination of the testimony at both the original and instant hearings.

Initially, however, we wish to draw attention to a phrase which may well have been a causative factor in confusing the original hearing, viz., a "favorable freight rate." As will be shown below, the adjective "favorable" is susceptible to two different meanings. In one sense, it could mean a rate which is advantageous vis-a-vis competitors. In a quite different sense, a "favorable freight rate" refers to a rate which is lower than a posted rate. It was, we believe, a confusion of these two meanings which explains the varying testimony which was elicited at these two hearings.

In the first hearing, Suchy testified that Duval's biggest problem "is to get a favorable freight rate to ship, so that he can get a competitive price with the existing sources of glass sand" (Exh. 5; 1 Tr. 16). 3/ Duval then testified that he had, through negotiation, obtained

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3/ The relevant portions of the former testimony of Duval and Suchy were introduced as Exhibits 4 and 5 respectively. In order to focus on the exact testimony and at the same time avoid confusion with the

in 1965, a freight rate of $4.80 a ton from Coos Bay to Seattle, a process which he noted took about 6 months (Exh. 4; 1 Tr. 84-85). Subsequently, Duval noted that "the freight rate has been finally overcome with regards to establishing a definite rate * * * from Coos Bay to Seattle" (Exh. 4; 1 Tr. 92). Additionally, Duval submitted an exhibit which expressly stated that there was no published commodity rate between Coos Bay and either Portland or Seattle (Exh. 6).

It seems relatively clear that both Suchy and Duval assumed that in the absence of a posted freight rate one could only be obtained by negotiation and that it was important to obtain a "favorable" freight rate which would be competitively advantageous as compared with that charged other suppliers of silica sand. Unfortunately, as the testimony in the present appeal of W. H. Francis, Pricing Manager for the Southern Pacific Railroad, makes clear, both Duval and Suchy were in error in their assumption that there was no posted freight rate from Coos Bay to either Portland or Seattle (2 Tr. 28-38).

Turning to the transcript in the instant case, we must note that this original misconception was compounded by an apparently inadvertent mistake by Suchy in responding to a question posed by contestees' counsel. In examining Suchy with reference to his prior testimony, counsel propounded the following question:

> Were you aware, that as of July 12, 1961, that the S.P. -- the Southern Pacific Railway -- had a rate from Coos Bay to Portland, for sand? A commodity rate of 22 1/2 cents per hundred, for a covered car, and for 20 1/2 cents per hundred for uncovered, or $4.50 per ton and * * * [$4.10] per ton respectively, when you gave that testimony back in 1967?

(2 Tr. 18).

Suchy responded: "I learned about it during the testimony by Maurice Duval. I think that's in the testimony, also." Id.

It is clear that Suchy's answer related to the freight rates of which Duval had testified at the original hearing. The problem is that at the first hearing Duval had testified concerning a negotiated rate for $4.80 a ton, from Coos Bay to Seattle established in 1965. At the time Suchy answered counsel's question there was nothing in the record relating to the freight rate cited by contestees' counsel. This freight rate was subsequently established by the testimony of Francis. See 2 Tr. 28-29. Suchy's response almost certainly was based on his confusion concerning what Duval had testified to at the original hearing compared to the question asked by counsel at the second hearing.

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fn. 3 (continued)
present transcript, the former testimony of Duval and Suchy will be cited first to the exhibit number and then to the page of the original transcript.

Thus, to the extent that Judge Clarke deprecated the testimony of Suchy relating to freight rates because of a perceived admission on Suchy's part that he was aware of the existence of posted rates at the time he testified in 1967, we believe the decision below to be in error. While we recognize that both Suchy and Duval were wrong in their earlier assumption that no posted freight rates existed, this testimony was elicited in the contestees' case, and thus is not probative of the existence of a prima facie case.

[2] The crux of contestant's appeal seems to be that inasmuch as the Board had examined other silica sand claims held by Duval in the same area and had determined there was no discovery as of 1961 because Duval was not able to show present marketability, the same result should accordingly obtain in the present case. The conclusion, however, does not flow from the premise.

A fundamental predicate of administrative adjudication is that the record developed below must serve as the basis of any decision on appeal. Departmental regulations thus expressly note that where a hearing has been held "the record made shall be the sole basis for decision" excepting only facts of which official notice may be taken. See 43 CFR 4.24(a)(3). In one sense, this section merely reinforces the prohibition against ex parte communications found in 43 CFR 4.27(b). But equally implicit in this regulation is the recognition that the record, as developed in each particular hearing, must be the basis upon which the law is applied.

Thus, the mere fact that appellees possessed similar claims which had been deemed to be invalid in an earlier contest cannot be said to be dispositive of the instant appeal. If such were the law, the entire hearing in the second contest would be no more than a futile exercise in irrelevancy. This is not to say that the law, as applied in United States v. Duval, supra, is open to revision at a subsequent hearing. The law upon which the original decision was premised was not only correctly interpreted as of the time of the original Duval case, it remains correct to this day. The question involved in this case, however, is whether under the facts as established in the instant hearing, appellees have brought themselves within the law and preponderated over the Government's showing of lack of discovery. We believe, as did Judge Clarke, that they have.

The problem which appellees faced, namely, breaking into a "captive" market, has been discussed in a number of Board decisions. In United States v. Gibbs, 13 IBLA 382 (1973), this Board noted that "where demand is limited to a very few consumers who supply their needs from their own sources, so that the market is 'closed' or 'captive,' we have held, quite properly, that a mining claimant must prove that the customers will buy the produce of his claim at a profit, failing which it will be assumed that his mineral deposit has no economic value and does not qualify as a discovery." Id. at 393. More specifically in this Board's decision in United States v. Duval, supra, we examined the evidence adduced at the original hearing and concluded that:

> Mr. Duval's testimony with regard to the market-ability of this sand was strongly future-oriented, tending to show his belief that recent and anticipated developments in the industry will enable him to find a market in the forseeable [sic] future, rather than demonstrating that the sands could have been marketed prior to the 1961 withdrawal.

1 IBLA at 111.

In contradistinction to the paucity of evidence relating to marketability as of the critical date (in the instant case being January 19, 1962), the record in the instant case closed numerous evidentiary gaps. Thus, W. H. Frazier established that freight rates were in existence and were available for appellees' use in 1962. Clifford A. Holmes, General Manager of the Northwest Foundry Division, Moore Clear Company, for the past 22 years, testified that there would have been a definite market for sand from the subject claims for foundry use in 1961 (2 Tr. 45). Delmar Roses, who as Supervisor of the Purchasing and Transportation Division of Owens-Illinois for the past 19 years was responsible for developing sources of sand, testified that Owens-Illinois had been searching for alternative supplies of sand as early as the mid-fifties and stated that there was a market for sand from the Duval claims in 1962 (2 Tr. 62-66).

Thus, contrary to the meager showing of marketability at the first hearing, contestees presented clear testimony tending to show their ability to infiltrate the "closed" market for silica sand in 1962. See generally Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). We agree with Judge Clarke that on the basis of the record established at the hearing, contestees have preponderated on the issues raised by the complaints. 4/ Judge Clarke correctly dismissed the contest complaints.

4/ In its posthearing brief, counsel for the Government raised the question whether appellees' claims contained excess reserves. This was the first time the question of excess reserves surfaced in this case. As we noted in United States v. McElwaine, 26 IBLA 20 (1976), a matter not charged in the complaint cannot be used as a ground to find a claim invalid unless it has been raised at the hearing and the contestee has not objected. See also United States v. Northwest Mine and Milling, Inc., 11 IBLA 271 (1973). Moreover, as we held in United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975), absent a patent application, where a mining claimant preponderates on issues raised in the complaint and at the hearing, the contest is properly dismissed regardless of any possible infirmity relating to an issue not joined in the contest. See also United States v. Hooker, 48 IBLA 22 (1980). The question of the existence of excess reserves is thus not properly the subject of these contests and we make no ruling thereon. But see Baker v. United States, 613 F.2d 224 (9th Cir. 1980), cert. denied sub nom. Andrus v. Baker, 101 S. Ct. 332 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge